Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TEXAS SOUTHERN UNIVERSITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a *qui tam* suit against a State or state agency is barred by the Eleventh Amendment.

PARTIES TO THE PROCEEDINGS

The United States of America, represented by the Attorney General of the United States, was an intervenor in the court of appeals and is the petitioner in this Court. Texas Southern University, Barbara Hayes, Arun Jadhav, Curtis W. McDonald, and Joseph Jones were appellants in the court of appeals. The United States of America ex rel. Chandra Mittal was the appellee in the court of appeals.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is not yet reported. The opinion of the district court (App., *infra*, 3a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. Section 3729 of Title 31, United States Code, provides in pertinent part:

> **False claims**
>
> (a) LIABILITY FOR CERTAIN ACTS.–Any person who–
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> * * * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.

3. Section 3730 of Title 31, United States Code, provides in pertinent part:

> (b) ACTIONS BY PRIVATE PERSONS.–(1) A person may bring a civil action for a violation of section 3729 for the person and for the United

States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any "person" from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The FCA also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). When a *qui tam* action is brought, the government is given an opportunity to intervene to take over the suit. 31 U.S.C. 3730(b)(2) and (c)(3). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of civil penalties, those penalties are divided between the government and the relator. 31 U.S.C. 3730(d).

2. The instant case involves a *qui tam* action filed by Dr. Chandra Mittal alleging the submission of false claims in connection with the receipt of a grant from the Research Center in Minority Institutions, a division of the National Institutes of Health. See App., *infra*, 3a-4a. The defendants included Texas Southern University (TSU) and four of its officials. See *id.* at 5a. Those defendants are respondents in this Court. The defendants moved to dismiss the *qui tam* claims, arguing (*inter alia*) that (1) the suit was barred by the Eleventh Amendment, and (2) a State or state agency is not a "person" subject to liability under the FCA, 31 U.S.C. 3729. See App., *infra*, 5a.[1]

The district court denied the defendants' motion to dismiss the *qui tam* claims against them. App., *infra*, 3a-21a. The court held that the Eleventh Amendment did not bar the suit, *id.* at 10a-16a, and that the defendants are "person[s]" within the meaning of the FCA, *id.* at 16a-21a.

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[1] As noted in the text, the defendants in this case included individual TSU officials as well as TSU itself. A suit for retrospective monetary relief filed against a state officer in his official capacity is treated, for Eleventh Amendment purposes, as a suit against the State. See, *e.g.*, *Kentucky* v. *Graham*, 473 U.S. 159, 169 (1985); *Cory* v. *White*, 457 U.S. 85, 90 (1982); *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974). By contrast, a state officer sued in his personal capacity may not assert Eleventh Amendment immunity. See, *e.g.*, *Hafer* v. *Melo*, 502 U.S. 21, 29-31 (1991). The apparent understanding of the courts below was that the individual defendants in this case were sued in their official capacities. Thus, the district court stated that "[i]t is undisputed that the state university Defendants in this case enjoy the state's Eleventh Amendment immunity, to the extent that it applies." App., *infra*, 11a. And the court of appeals ordered dismissal of the entire complaint, based on its conclusion that the Eleventh Amendment bars a *qui tam* suit against an unconsenting State. *Id.* at 2a.

3. The defendants filed an interlocutory appeal. The United States government, represented by the Attorney General, intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the FCA's *qui tam* provisions. App., *infra*, 22a-23a. The court of appeals reversed. *Id.* at 1a-2a. The court explained (*id.* at 2a) that the case was controlled by its recent decision in *United States ex rel. Foulds* v. *Texas Tech University*, 171 F.3d 279 (5th Cir. 1999), petitions for cert. pending, Nos. 99-321, 99-365 & 99-513. In *Foulds*, the Fifth Circuit held that unless the United States elects to take over the conduct of a particular *qui tam* action, a *qui tam* suit against a state defendant is barred by the Eleventh Amendment. See *Foulds*, 171 F.3d at 294; App., *infra*, 2a.

ARGUMENT

On June 24, 1999, this Court granted the petition for a writ of certiorari in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828. The second question presented in that case is "[w]hether the Eleventh Amendment precludes a private relator from commencing and prosecuting a False Claims Act suit against an unconsenting State." 98-1828 Pet. at i.[2] The petition explains that the Second Circuit's resolution of that constitutional question in *Vermont Agency of Natural Resources* conflicts directly with the Fifth Circuit's decision in *Foulds*. See 98-1828 Pet. at 12-15.

As our brief on the merits in *Vermont Agency of Natural Resources* explains (98-1828 U.S. Br. at 33-49),

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[2] *Vermont Agency of Natural Resources* also presents the question "[w]hether a State is a 'person' subject to liability under 31 U.S.C. § 3729(a) of the False Claims Act." 98-1828 Pet. at i.

the position of the United States is that a *qui tam* suit against a State or state agency is not barred by the Eleventh Amendment. The Court's decision in *Vermont Agency of Natural Resources* will very likely affect the proper disposition of the instant case. The petition for a writ of certiorari should therefore be held pending this Court's decision in *Vermont Agency of Natural Resources* and then disposed of as appropriate.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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MARCH 2000

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20099
Summary Calendar

UNITED STATES OF AMERICA, EX REL.
CHANDRA MITTAL, PH. D, PLAINTIFF-APPELLEE

v.

TEXAS SOUTHERN UNIVERSITY, ET AL., DEFENDANTS

TEXAS SOUTHERN UNIVERSITY; BARBARA HAYES;
ARUN JADHAV, DOCTOR; CURTIS W. MCDONALD;
JOSEPH JONES, DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF TEXAS
USDC NO. H-97-CV-554

[Filed Dec 20, 1999]

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:*

This interlocutory appeal involves a *qui tam* action brought under the False Claims Act ("FCA") against Texas Southern University and some of its employees and former employees. Appellants appeal the denial of their motion to dismiss, which averred that plaintiff/relator's action is barred by the Eleventh Amendment and that defendants are not "persons" within the meaning of the FCA. This appeal is controlled by *United States, ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) (holding that "when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court"), *petition for cert. filed*, 68 U.S.L.W. 3138 (U.S. Aug. 23, 1999) (No. 99-321), *petition for cert. filed*, 68 U.S.L.W. 3153 (U.S. Aug. 27, 1999) (No. 99-365), *petition for cert. filed* (Aug. 27, 1999) (No. 99-513). *See also United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999).

Accordingly, the order denying the motion to dismiss is REVERSED, and the case is REMANDED for entry of a judgment dismissing the complaint.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-97-554

UNITED STATES OF AMERICA, EX REL.
DR. CHANDRA MITTAL, PLAINTIFF

V.

TEXAS SOUTHERN UNIVERSITY, ET AL., DEFENDANTS

ORDER

Pending before the Court is Defendants' Motion to Dismiss Under Rules 12(b)(1) and 12(b)(6) (Dkt. #17). Having considered the motion, the response thereto, the entire record and the applicable legal authorities, the Court believes that the motion should be DENIED.

FACTUAL BACKGROUND

Dr. Mittal was hired by Texas Southern University ("TSU") in 1992 to work as a Senior Research Associate, a non-faculty position which required him to teach in the "Hypertension Cluster" of a project called "Center for the Study of Ethnic Diseases." This project was funded by a grant from the Research Center in Minority Institutions ("RCMI") which is a division of the National Institutes of Health ("NIH"), a federal agency. The funding of this project, pursuant to the grant applications submitted by TSU, is the subject of

this qui tam action brought under the False Claims Act ("FCA"), 31 U.S.C. § 3730.

In the complaint, Plaintiff/Relator alleges that, in order to obtain RCMI funding from the NIH, "TSU committed to the NIH that the 'faculty hired under the RCMI program after this cycle of RCMI funding has ended' would become university employees 'transfer[ed] to a state line.'" Plaintiff Relator's Original Complaint, ¶ 14 (quoting TSU's 1992 RCMI Application for Continuation Grant at 55). This was an important statement, Plaintiff alleges, because "[t]he RCMI program requires that beyond the period of RCMI support, recipient institutions will maintain on a long term basis the faculty recruited and physical infrastructure developed." *Id.* ¶ 13. Plaintiff alleges that TSU's representation concerning its commitment to transfer Senior Research Associates hired under the RCMI program was false because Mittal was never given a faculty position and because TSU "had no sincere intention of employing Mittal after the expiration of the RCMI grant." *Id.* ¶ 14.

Plaintiff also alleges that TSU made numerous subsequent false statements concerning (1) similar representations that Mittal would be retained; (2) the submission of a partially-plagiarized project for NIH funding; (3) a 1993 request for funding (pursuant to TSU's 1993 Minority Biomedical Research Support Program ("MBRS") Application) of Mittal's project for a four-year period (September 1994 through August 1998) even though TSU knew that Mittal's salary was funded only by the RCMI grant and that TSU would not offer Mittal a permanent position at the University; (4) representations in applications and "continuation applica-

tions" to MBRS that (a) Mittal's subproject was continuing and (b) Mittal would continue to do research and be employed by TSU for the period of the grant (September 1, 1995 to August 31, 1996) even though TSU had already informed Mittal that his position would be terminated effective August 31, 1995; and (5) representations by TSU in its Training Grant Application to the Center for Disease Control/MHPF ("CDC/MHPF") for a Ph.D. program for the period September 1994-1999 that Mittal was a faculty mentor even though Mittal was not a faculty member and his name was deleted from the program after the CDC/MHPF had approved the funding. *See id.* ¶¶ 21-59.

Defendant has moved to dismiss the case on four grounds: (1) Plaintiff/Relator's alleged failure to adhere to the "jurisdictional prerequisites" provided by 31 U.S.C. § 3730(b)(2)-(4); (2) Plaintiff/Relator's failure to state a claim for relief under the statute, or in the alternative, Plaintiff/Relator's failure to plead with particularity as required by Federal Rule of Civil Procedure 9(b); (3) TSU's immunity from suit under the Eleventh Amendment; and (4) TSU's immunity from suit under the FCA because TSU and its officials, as "State Defendants," are not "persons" who may be held liable. The Court will consider these arguments in turn:

I. Plaintiff's Compliance with Statutory Prerequisites

The False Claims Act provides that

Any person who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United

> States Government . . . a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person [unless the court finds that the person committing the violation furnished information to Government officials concerning the false claim within 30 days after obtaining the information (if, at the time the person furnishes the information, no criminal, civil or administrative action has begun) or the person otherwise fully cooperates with the Government investigation of such violation, in which case,]
>
> the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person.

31 U.S.C.A. § 3729(a) (West Supp. 1998). The False Claims Act defines "knowingly" as (1) having "actual knowledge of the information," (2) "act[ing] in deliberate ignorance of the truth or falsity of the information," or (3) "act[ing] in reckless disregard of the truth or falsity of the information." *Id.* § 3729(b). The Act further provides that "no proof of specific intent to defraud is required." *Id.* A "claim" is "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor,

grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded . . . ." *Id.* § 3729(c).

Section 3730 of the False Claims Act provides that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." *Id.* § 3730(b). The person bringing such an action must comply with certain statutory requirements:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) [now Rule 4(i)] of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

Id. § 3730(b)(2). If the Government declines to take over the action, "the person bringing the action shall have the right to conduct the action" and "shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds." *Id.* § 3730(b)(4) & (d)(2). However, a court does not have jurisdiction over such actions by a private party unless the party is "an

original source of the information." *Id.* § 3730(e)(4)(A)-(B) (defining "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information").

According to the affidavit testimony of Samuel Longoria, Assistant United States Attorney, Mittal served the complaint on the United States Government on or about March 11, 1997 in compliance with both 31 U.S.C. § 3730(b)(2) and the Federal Rules of Civil Procedure.[1] Additionally, he filed the complaint with the Court *in camera.* The case was kept under seal until the United States notified the Court on June 17, 1997 of its intention to decline intervention in the case. Accordingly, the Court ordered the case unsealed on June 18, 1997. This course of events clearly meets the procedural requirements listed in § 3730(b)(2)-(4). The case cited by Defendants does not provide otherwise. *See Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997) (merely noting § 3730(b)'s prerequisites when finding (1) that the government could appeal despite its failure to intervene at the outset of litigation and (2) that voluntary dismissal could not be granted without consent of the Attorney General).

---

[1] The affidavit states that the complaint was served in compliance with Federal Rule of Civil Procedure 4(d)(4), the predecessor to Federal Rule of Civil Procedure 4(i). The Court assumes that the reference was in error and that the service met the provisions of Federal Rule of Civil Procedure 4(i), the provision relevant to service upon the United States.

Defendants' assertion that the case should be dismissed because *the complaint failed to allege* the meeting of these procedural prerequisites is unfounded. There is no statutory requirement that the relator make such allegations in his complaint; such a requirement would not make sense given the simultaneous filing of the complaint under seal and the service of the sealed complaint upon the United States. Moreover, even if such a strange requirement existed, Plaintiff's failure to observe it would not be jurisdictional. Courts have consistently found the prerequisites listed in § 3730(b)(2)-(4) to be procedural in nature, *not jurisdictional. See United States ex rel. Weinberger v. Equifax*, 557 F.2d 456, 460 (5th Cir. 1977) (relator does not lack standing simply because he fails to comply with procedural requirements of the Act), *cert. denied*, 434 U.S. 1035 (1978); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1344 (4th Cir.) (§ 3730(b)(4) is not a jurisdictional requirement), *cert. denied*, 513 U.S. 928 (1994); *United States ex rel. Mikes v. Straus*, 931 F. Supp. 248, 259-60 (S.D.N.Y. 1996) ("The notification provision [of § 3730(b)(2)] is a mere procedural requirement of the exercise of the right created by the statute, not a jurisdictional prerequisite [and] where the government has not been deprived of any rights, and has asserted no objection to plaintiff's failure to comply with § 3730(b)(2)'s procedural requirements, defendants should not stand to benefit.").

II. The Sufficiency of the Complaint

Next, Defendant argues that the case should be dismissed for failure to state a claim upon which relief can be granted and/or for failure to plead with particularity as required by Federal Rule of Civil Proce-

dure 9(b). It is true that "[c]laims brought under the FCA must comply with Rule 9(b) [and a]t a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, where, and how' of the alleged fraud." *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) ("the complaint must set forth a factual basis").

Plaintiff's lengthy complaint details eight separate false claims allegedly made by Defendants to federal agencies in order to obtain federal funding. For each of these claims, Mittal sets forth the "who, what, where, and how" of the assertions and provides an adequate factual basis (for Rule 9(b) purposes) for each of the assertions. His complaint clearly states a claim upon which relief can be granted and is pled with sufficient particularity. Therefore, the Court will not dismiss on this ground.

III. The Liability of a State, Its Agencies and Its Officials for Violations of the False Claims Act

Defendants argue that they, as "State Defendants," cannot be liable for violations of the FCA both because such liability is prohibited by the Eleventh Amendment and because states should not be considered "persons" subject to liability under the FCA. The Court will address these arguments in turn:

A. These Defendants Are Not Immune from Suit Under the False Claims Act by Virtue of the Eleventh Amendment

Defendants argue that the Eleventh Amendment bars suits brought by *qui tam* plaintiffs under the FCA because such actions constitute federal lawsuits

brought by private parties without the consent of the state or the abrogation of the state's immunity by Congress. Essentially, they argue that because the suit is brought by a private party, albeit through a *qui tam* device, the suit must meet the scrutiny of the Eleventh Amendment. As Texas has not waived its immunity in this case, Defendants argue that the Court must, therefore, apply the standards in *Seminole Tribe v. Florida* to determine whether Congress has abrogated the states' sovereign immunity. Application of *Seminole Tribe v. Florida* would require the Court to consider (1) whether, in enacting the FCA, Congress "unequivocally expresse[d] its intent to abrogate the immunity" and (2) "whether Congress has acted 'pursuant to a valid exercise of power.'" 517 U.S. 44, 55 (1996). Defendants then argue that no such unequivocal expression is apparent in the statute and, even if it were, Congress did not act pursuant to a valid exercise of power in making the states subject to suit. Therefore, Defendants conclude that they may not be held liable for violations of the FCA. The Court disagrees.

It is undisputed that the state university Defendants in this case enjoy the state's Eleventh Amendment immunity, to the extent that it applies. *See Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996); *United States ex rel. Fine v. Chevron U.S.A., Inc.*, 39 F.3d 957, 962 (9th Cir. 1994) (a university is a state entity for purposes of the Eleventh Amendment), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1233 (1996). The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens

of another State, or Citizens or any Foreign State." U.S. Const. amend. XI. It is well-established that this Amendment also bars suits against a state by its own citizens. *See Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). However, the states have no sovereign immunity against the United States. *See id.* (a permanent waiver of the states' immunity from suit by the United States is "inherent in the constitutional plan"); *United States v. Mississippi*, 380 U.S. 128, 140 (1965) ("nothing in [the Eleventh Amendment] or in any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States"); *Seminole Tribe*, 517 U.S. at 71 n.14 ("the Federal Government can bring suit in federal court against a State").

Therefore, the question in this case is whether a *qui tam suit* under the FCA should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred. In ruling on this question, it is important to note that the circuit courts that have considered similar issues have unanimously agreed that the government is the real party in interest in *qui tam* actions brought under the FCA, even if the government elects not to intervene in the case. *See United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 48-50 (4th Cir. 1992) (finding that the United States is the real party in interest in any FCA suit, even where it permits a *qui tam* relator to pursue the action on its behalf, because (1) the suit is brought "in the name of the Government" by a relator who "is essentially a self-appointed private attorney general [and whose] recovery is analogous to a lawyer's contingent fee" (2) the injury is suffered by the

government, not the individual, (3) the government may choose to intervene and pursue the suit itself, and (3) the government is entitled to the lion's share of any amount recovered since it gets at least 70% even if it does not intervene); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.) ("In a *qui tam* action, the plaintiff sues on behalf of and in the name of the government and invokes the standing of the government resulting from the fraud injury."), *cert. denied*, 508 U.S. 973 (1993); *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990) ("although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest"); *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 872 (8th Cir. 1998) ("in an action under the False Claims Act, the United States is the real party in interest because of its significant control over the course of the litigation and its dominant share of the proceeds thereof"); *United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1212-13 (7th Cir. 1995) (finding that the Government, and not the relator, is the real party in interest and citing a long history of Supreme Court cases indicating that the Supreme Court would approve of this principle) (citing, for example, *Marvin v. Trout*, 199 U.S. 212, 225 (1905) which noted that *qui tam* actions "by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government"); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994) (in a *qui tam* action, the Government is the

real party in interest), *cert. denied*, 117 S. Ct. 296 (1996).[2]

The courts have also concluded that because of the government's status as the real party in interest, Eleventh Amendment immunity does not apply to *qui tam* actions brought against state entities. *See Milam*, 961 F.2d at 49-50 (because the United States is the real party in interest, the state university center's Eleventh Amendment immunity defense "evaporates"); *United States ex rel. Berge v. Board of Trustees of the Univer-*

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[2] The Fifth Circuit has not yet directly addressed the questions at issue in this case. However, in a case involving the government's right to appeal an order approving the settlement of a *qui tam* action under the FCA, the court noted that "the United States is a real party in interest even if it does not control the False Claims Act suit." *Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154, 156 (5th Cir. 1997) (citing *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48-49 (4th Cir. 1992)).

As the issue affects the *qui tam* plaintiff's standing and the defendant's potential immunity, the Fifth Circuit has not yet provided guidance. However, the matter is the subject of some dispute among the district courts within this circuit. In fact, at least two cases addressing the issues presented by this case are presently before the Fifth Circuit on appeal. In one, *United States ex rel. Foulds v. Texas Tech Univ.*, the court concluded that since the Government is the real party in interest in a *qui tam* action, it followed that sovereign immunity to the state defendant was unavailable and states could be liable under the FCA. 980 F. Supp. 864, 870-71 (N.D. Tex. 1997) (concluding (1) that a state university does not have Eleventh Amendment immunity from FCA suits and (2) that states are properly considered "persons" under the FCA). In another, *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, the court concluded that a *qui tam* plaintiff, and not just the government, must suffer an injury-in-fact in order to bring suit under the FCA. 982 F. Supp. 1261, 1263-68 (S.D. Tex. 1997) (finding that the plaintiff did not have standing to bring the suit).

sity of Alabama, 104 F.3d 1453, 1457-58 (4th Cir.) (reaffirming the Fourth Circuit's holding that a state university does not have Eleventh Amendment immunity from suits under the FCA; holding that the Supreme Court's decision in *Seminole Tribe* (that Congress must use unequivocal statutory language if it intends to abrogate the sovereign immunity of states in actions brought by and for private parties) was "a non-issue in the False Claims Act context" because there is no question of abrogation of immunity where the Federal Government is the entity bringing suit against a state), *cert. denied*, 118 S. Ct. 301 (1997); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) ("a *qui tam* action under th[e FCA] is a suit by the United States for Eleventh Amendment immunity purposes"; therefore, "[t]he State and its agencies are not entitled to Eleventh Amendment immunity"); *United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 154 F.3d 870, 872-73 (8th Cir. 1998) (reaffirming that state universities do not have immunity in FCA suits and finding that *Seminole Tribe* does not change the analysis since the Supreme Court decision did not place in question the power of the federal government to sue a state); *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, No. 97-6141, 1998 WL 880610, at *7 (2d Cir. Dec. 7, 1998) ("In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits, we conclude that such a suit is in essence a suit by the United States and hence is not barred by the Eleventh Amendment."); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 963 (9th Cir. 1994) (since the *qui tam* plaintiff's action against the University of California was

really a suit by the United States, as the real party in interest, the suit was not barred by the Eleventh Amendment), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1233 (1996); *United States ex rel. Long v. SCS Business & Tech. Inst.*, 999 F. Supp. 78, 83-84 (D.D.C. 1998) (finding that the Eleventh Amendment is not a bar to an FCA action "because the United States is always the plaintiff in a *qui tam* action and the Eleventh Amendment does not prohibit suits by the United States against States in federal court;" listing numerous cases in which states, and state universities, have been defendants in *qui tam* suits under the FCA).

The Court agrees with the conclusions reached by these courts. Therefore, the Court finds that in this case (1) the United States is the real party in interest, (2) the suit is, therefore, for Eleventh Amendment purposes, a suit by the United States against which the State Defendants have no Eleventh Amendment immunity, and (3) the standards articulated by *Seminole Tribe* are, therefore, inapplicable as the *Seminole Tribe* test for immunity abrogation does not apply to suits brought against states by the federal government. For these reasons, the Court rejects Defendants' motion to dismiss on the ground that they are entitled to Eleventh Amendment immunity.

B. State Entities Are "Persons" that May Be Liable for FCA Violations

Defendants' final argument is that *qui tam* suits against the states are not authorized by the FCA itself since states are not "persons" as that term is used in the FCA. Section 3729(a) imposes liability on "[a]ny person" who makes false statements or claims to the

United States government, but it does not define the term "person." Nevertheless, by employing ordinary statutory construction principles and conducting an analysis of legislative history, the Second and Eighth Circuits have found that states should be viewed as "persons" within the liability provision of the FCA.[3]

1. The "Plain Statement" Rule Does Not Apply to the Construction of the FCA

Essentially, these courts have begun their analyses by rejecting the applicability of the "plain statement rule": the rule that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, No. 97-5141, 1998 WL 880610 at *7 (2d Cir. Dec. 7, 1998). They explained that "[t]he Supreme Court has never held that this principle is applicable in every instance in which it is argued that a statute imposes liability on the States. Rather, the . . . rule [applies] only when the effect of the statute would be to intrude on the States' traditional authority and 'upset the usual constitutional balance of federal and state powers.'"

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[3] The only authority to the contrary is found in district court opinions that have been either reversed or overruled by the Second or Eighth Circuits. *See United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 992 F. Supp. 1097 (D. Minn. 1998) (granted the university's motion to dismiss claims brought against it under the FCA since states are not persons under the FCA), *rev'd*, 154 F.3d 870 (8th Cir. 1998); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998) (finding that state, city and municipal agencies did not qualify as "persons" who could be sued under the FCA), *overruled by United States ex rel. Stevens v. Vermont Agency of Natural Resources*, No. 97-6141, 1998 WL 880610 (2d Cir. 1998).

Ibid. (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) ("if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'").

With this standard in mind, the courts concluded that "a False Claims Act action against a State falls within 'the usual constitutional balance between the States and the Federal Government.' Therefore, Congress's intent to include States as liable parties need not be manifest in 'unmistakably clear' language." *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 874 (8th Cir. 1998); *see also Stevens*, 1998 WL 880610, at *8 ("In the FCA, we see no alteration of 'the usual constitutional balance of federal and state powers' such as to require application of the plain statement rule."). Accordingly, these courts rejected the application of the plain statement rule noting that since "the States have no Eleventh Amendment immunity against the United States *ab initio[,]* there is no reason Congress would have displaced it in the False Claims Act." *Zissler*, 154 F.3d at 873; *see also Stevens*, 1998 WL 880610, *8. The courts, therefore, proceeded to interpret the statute under the ordinary canons of statutory construction.

2. Construction of the Statute Leads to the Conclusion that States Are "Persons" under the FCA

In construing the statute, the courts made the following findings: (1) to the extent that a presumption against inclusion of a sovereign in the meaning of the

term "person" is generally applicable to this case,[4] it does not prevail in this case because "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute . . . indicate an intent, by the use of the term ["person"] to bring [the state] within the scope of the law." *Zissler*, 154 F.3d at 874 (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941)); *see also Stevens*, 1998 WL 880610, at *8; (2) Congress's intent to include states within the term "person" is evident from its use of the same term in other provisions of the statute that have been widely recognized as encompassing states, *see Stevens*, 1998 WL 880610, at *8 (noting that "person" is used to define both who may be sued (in § 3729(a)) and who may bring a *qui tam* suit (in § 3730(b)(1)) and that states, Congress and courts have all indicated that they view states as "persons" able to bring *qui tam* actions under § 3730(b)(1); citing numerous cases and the legislative history of *Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), a case which was cited in Congress with disapproval but which was not controversial for the proposition that suits could be brought by states); *Zissler*, 154 F.3d at 875 (noting the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning" and pointing out that states have acted as *qui tam* plaintiffs under § 3730 which allows civil actions by "private persons"); (3) since it is "plain" that states are "persons" within the meaning of § 3730(b)(1),

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[4] The Eighth Circuit did not believe that this canon of construction was applicable to states defending suits under the FCA because "the presumption of sovereign exclusion applies only to 'the enacting sovereign,' in this case the United States." 154 F.3d at 874.

there is an inference that Congress meant the word to have the same meaning in § 3729(a) absent some indication to the contrary, *see Stevens*, 1998 WL 880610, at *9; *see also Zissler*, 154 F.3d at 875 (since states act as plaintiffs, "[i]n the absence of language to the contrary, they should also be 'persons' when sued as defendants"); and (4) the legislative history of the 1986 amendments to the FCA indicate that Congress understood that the FCA had, at all times, applied to the states and would continue, after the 1986 amendments, to apply to the states, *see Stevens*, 1998 WL 880610, at *11 (citing a provision of the amendments authorizing certain investigations on "persons," specifically defined to include "any State or political subdivision of a State," and noting that "[p]resumably, Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the 'persons' who are suable under the Act").

Other courts have likewise held that states should be viewed as "persons" for purposes of the liability provision of the FCA. *See, for example, United States ex rel. Long v. SCS Business & Tech. Inst.*, 999 F. Supp. 78, 84 (D.D.C. 1998) (in addition to making some of the same findings reached by the courts in *Zissler* and *Stevens*, the court observed that the Senate Report accompanying the 1986 amendments set out "the broad reach of the statute" when it stated that the FCA reaches all persons submitting false claims and that the "term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof").

The Court agrees with the decisions of these courts. Accordingly, the Court finds that the State Defendants in this case are properly considered "persons" who may be liable for violations of the FCA. For all of the above reasons, Defendants' motion to dismiss is, in all things, DENIED.

So ORDERED.

The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 20th day of January, 1999.

/s/ JOHN D. RAINEY
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20099

UNITED STATES OF AMERICA, EX REL,
CHANDRA MITTAL, PHD
PLAINTIFF-APPELLEE

v.

TEXAS SOUTHERN UNIVERSITY; BARBARA HAYES;
ARUN JUDHAV, DOCTOR; CURTIS W MCDONALD;
JOSEPH JONES, DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON

ORDER

IT IS ORDERED that the motion of the United States of America to intervene is GRANTED.

IT IS FURTHER ORDERED that the motion of the United States of America to stay the appeal pending disposition of the writ of certiorari in Vermont Agency of Natural Resources vs. United States ex rel. Stevens is DENIED.

IT IS FURTHER ORDERED that the motion of appellants for leave to file their brief and record excerpts out of time is GRANTED.

/s/ FORTUNATO P. BENAVIDES
FORTUNATO P. BENAVIDES
UNITED STATES CIRCUIT JUDGE

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
APR 19 2000
CLERK

(2)

NO. 99-1544

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

TEXAS SOUTHERN UNIVERSITY, BARBARA HAYES, ARUN JADHAV, CURTIS W. McDONALD, JOSEPH JONES,
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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NO. 99-1544

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

TEXAS SOUTHERN UNIVERSITY, BARBARA HAYES, ARUN JADHAV, CURTIS W. McDONALD, JOSEPH JONES,
Respondents,

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

At issue in this case is whether the Eleventh Amendment's general prohibition against actions "commenced or prosecuted" by citizens against an unconsenting state bars an action brought by a private *qui tam* plaintiff against a state under the federal False Claims Act. U.S. CONST. amend. XI; 31 U.S.C. §§ 3729–3732.

The False Claims Act permits private citizens who believe a "person" has submitted a false claim for payment to the United States to sue the perpetrator to impose a penalty for the false claim, including treble damages. §§ 3729–3730. As an incentive, the private plaintiff receives a portion of the award. § 3730(d). While the statute deters fraud by private contractors, the Eleventh Amendment prohibits applying the False Claims Act to

unconsenting states. The False Claims Act contains no language waiving the Eleventh Amendment immunity of states and, in any event, Congress has no power to abrogate the states' Eleventh Amendment immunity under its Article I constitutional powers. *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

SUMMARY OF THE ARGUMENT

The Eleventh Amendment prohibits suits "commenced or prosecuted" against the states by private citizens. U.S. CONST. amend XI. Suits against states brought by private relators under the *qui tam* provisions of the False Claims Act violate the states' immunity as sovereigns and offend their dignitary interest in avoiding the coercive process of federal judicial tribunals in suits brought by private citizens. Congress cannot circumvent the Eleventh Amendment's proscriptions by allowing private plaintiffs to "stand in the shoes" of the federal government. *Qui tam* suits are "commenced" and "prosecuted" by private citizens, and the potential intervention of the United States cannot change that fact.

Because the Court has already heard the petition for writ of certiorari in *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2nd Cir. 1998), *petition for cert. granted*, 119 S.Ct. 2391 (June 24, 1999) (No. 98-1828), *argued Nov. 29, 1999*, to resolve the issue presented by petitioner, the Court should hold this petition pending resolution of *Stevens* and then dispose of the petition as appropriate.[1]

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[1] Respondents have also filed a conditional cross-petition that raises the "persons" issue also presented in the *Stevens* case.

ARGUMENT

I. ALLOWING PRIVATE CITIZENS TO BRING *QUI TAM* SUITS AGAINST THE STATES VIOLATES THE ELEVENTH AMENDMENT.

Subjecting the states to suits for money damages brought by private citizens under the *qui tam* provisions of the False Claims Act violates the Eleventh Amendment and the principles that motivated its passage. *See* 31 U.S.C. §§ 3729–3732; U.S. CONST. amend. XI. The Eleventh Amendment was enacted in a firestorm of protest shortly after the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that Article III authorized a South Carolina citizen to bring a private suit for damages against the State of Georgia. One of the Amendment's primary aims was to address the states' concern that "federal courts would force them to pay their revolutionary war debts, leading to their financial ruin." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

In addition to the concern with protecting the states' fisc, Eleventh Amendment jurisprudence also emphasizes the need to protect the integrity of the states as sovereign entities. *Hess*, 513 U.S. at 39. "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). The purpose of the Eleventh Amendment was to prevent the indignity of subjecting states to suits by private parties in federal court. *Id.* (citing *In re Ayers*, 123 U.S. 443, 505 (1887)).

By seeking money damages from the states at the urging of private plaintiffs, *qui tam* suits accomplish exactly what the

Eleventh Amendment forbids. The Court has recognized "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *Qui tam* suits brought by private citizens against the states are indistinguishable from other suits that impermissibly seek the payment of damages from a state's treasury. That the relator brings suit "on behalf of" the United States is irrelevant for Eleventh Amendment purposes. *See United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 883-84 (CADC 1999), *petition for cert. filed*, 68 U.S.L.W. 3116 (U.S. Aug. 2, 1999) (No. 99-213). The *qui tam* relator's supposed representation of the United States' interests is a legal fiction that cannot justify granting a private plaintiff the United States' exemption from the Eleventh Amendment's protections. *See In re Fernandez*, 130 F.3d 1138, 1138 (CA5 1997) (holding that private successors to the FDIC may not "avoid the Eleventh Amendment by slipping into the shoes of the United States"); *see also West Virginia v. United States*, 479 U.S. 305, 311 (1987) (sovereign immunity is not at issue in suit by federal government against state); *United States v. Texas*, 143 U.S. 621, 646 (1892) (same). It is "as plain as the sun" that Petitioner was "commenc[ing] or prosecut[ing]" *qui tam* suits "against one of the United States" in violation of the clear dictates of the Eleventh Amendment. *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 289 (CA5 1999); *see also* U.S. CONST. amend. XI. The Eleventh Amendment's protections of state sovereignty cannot be circumvented so easily. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

When an action "is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945); *see also Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). Even if the United States ultimately intervenes in the

suit, that does not change the Eleventh Amendment analysis.[2] A private citizen is still commencing suit against the state for money damages. The Eleventh Amendment cannot countenance an Act passed by Congress which allows a private citizen to commence an action against a sovereign state and make a claim on state funds, regardless of whether the United States has joined the suit as a party.

II. CONGRESS HAS NOT CLEARLY ABROGATED STATE SOVEREIGN IMMUNITY IN THE FALSE CLAIMS ACT.

Congress did not attempt in the False Claims Act to clearly abrogate state sovereign immunity. *See Seminole*, 517 U.S. at 55-56; *Foulds*, 171 F.3d at 294. But even if Congress had clearly attempted to abrogate state sovereign immunity in the False Claims Act, it could not have validly done so. The Court has only allowed abrogation of state sovereign immunity under the Fourteenth Amendment. *Seminole*, 517 U.S. at 59, 63 (overruling the Court's short-lived holding to the contrary in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality)). Congress enacted the False Claims Act under Article I of the Constitution, which the Court in *Seminole* and subsequent cases has held cannot be used to circumvent the Eleventh Amendment's limits on federal jurisdiction. *Id.* at 72-73; *see also United States ex rel. Stevens v. Vermont Agency of Nat. Resources*, 162 F.3d 195, 224 (CA2 1998) (Weinstein, J., dissenting), *petition granted*, (U.S. June 24, 1999) (No. 98-1828), *argued Nov. 29, 1999.*

The pertinent analysis when state sovereignty is involved does not end with determining whether Congress has attempted to find a way to bypass the Eleventh Amendment, *i.e.*, by allowing a

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[2] Contrary to petitioner's Mittal's assertion, *see* Pet. in 99-1566, at pp. 7-8, the United States has intervened in this suit only pursuant to 28 U.S.C. § 2403(a) to defend the constitutionality of the False Claims Act as applied to the states.

private party to vindicate "real party" rights of the federal government. Rather, the real question, as explained by the Court in *Seminole*, is whether Congress has the constitutional authority to do what it has done. *See Seminole*, 517 U.S. at 59; *see also City of Boerne v. Flores*, 117 S.Ct. 2157, 2159 (1997) (holding that the Religious Freedom Restoration Act was not a proper exercise of Congress's Fourteenth Amendment enforcement powers). As the Fifth Circuit held and as the D.C. Circuit in *Long* observed, "[*q*]*ui tam* plaintiffs cannot qualify as surrogates of 'responsible federal officers' who have the right to represent the sovereign to sue the respective states." *Foulds*, 171 F.3d at 293; *see Long*, 173 F.3d at 883.

Just as Article I provided no basis for the expansion of Article III in *Seminole*, the federal government's right to sue states cannot be expanded in opposition to the Eleventh Amendment by the device of *qui tam* suits. It is offensive to the Eleventh Amendment to use the states' surrender of sovereignty to the federal government to allow private parties to bring states into court and prosecute actions against them.[3]

Nor can the *qui tam* relator hide behind the jurisdictional skirts of the federal government. Private citizens cannot assume the federal government's right to sue states, which "is a narrow and nontransferable exception to the broad and fundamental constitutional principle of state sovereign immunity embodied in the Eleventh Amendment." *Stevens*, 162 F.3d at 214 (Weinstein, J., dissenting) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)); *see also United States v. Texas*, 143 U.S. 621, 646 (1892) (recognizing the federal government's right to sue

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[3] One commentator has suggested that *qui tam* actions are the hidden source of power to allow Congress to render the Supreme Court law on abrogation meaningless and should be used routinely to vindicate federal rights. *See* Jonathan R. Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

because states gave their consent in joining the union). This Court should require the United States to sue the states itself if, in the exercise of its supremacy, it determines that such a suit is required to preserve the "permanence of the Union." *Texas*, 143 U.S. at 644-45. The nature of dual sovereignty requires as much. "The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

If the *qui tam* device in the False Claims Act poses no constitutional problem, then Congress could set up any number of statutory devices to circumvent state sovereignty as long as there is a federal interest. Without Congress so stating, every Title IX, Title VI, and Section 504 case against a state would become a potential *qui tam* case, in which the plaintiff will demand, not actual damages, but a share of three times the federal funds received by the state for the past six years. Every public benefits class action involving federal funds could be a potential *qui tam* case.

The False Claims Act is unconstitutional—if applied to the states—because, through the *qui tam* device, it attempts to accomplish precisely what is forbidden by the Eleventh Amendment.

CONCLUSION

For these reasons, the Court should hold the petition for writ of certiorari pending resolution of the *Stevens* matter.

Respectfully submitted,

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